No. 19-5807

In the
Supreme Court of the United States

THEDRICK EDWARDS,

Petitioner,

v.

DARREL VANNOY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR JONATHAN F. MITCHELL AND ADAM K. MORTARA AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

ADAM K. MORTARA
Counsel of Record
TAYLOR A.R. MEEHAN
BARTLIT BECK LLP
54 W. Hubbard Street
Suite 300
Chicago, IL 60654
(312) 494-4400
adam.mortara@bartlitbeck.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST

Amici curiae have written and taught about this Court's criminal law and habeas corpus jurisprudence.[1] Jonathan F. Mitchell has taught federal habeas corpus as a professor and visiting professor at several law schools and is the former Solicitor General of the State of Texas. Mr. Mitchell recently served as a court-appointed *amicus curiae* in *In re Hall*, No. 19-10345 (5th Cir.), in which a federal prisoner is seeking authorization to file a second or successive motion under 28 U.S.C. § 2255. Adam K. Mortara is a Lecturer in Law at the University of Chicago Law School, where he has taught federal courts, federal habeas corpus, and criminal procedure since 2007. Mr. Mortara has also served as a court-appointed *amicus curiae* in criminal law and federal habeas cases, including by this Court in *Beckles v. United States*, No. 15-8544, and by the Eleventh Circuit in *Wilson v. Warden*, No. 14-10681, and *Bryant v. Warden, FCC Coleman-Medium*, No. 12-11212. The arguments made are solely those of *amici* and are not the views of the law schools where *amici* have taught or their other faculty.

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[1] Counsel for all parties have consented to this filing. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court's habeas precedents look more Ptolemaic than Copernican. What the lower courts are left with is an ever-more-complex, *ad hoc* approach to numerous doctrines, including retroactivity. And this is the state of play even in areas where Congress, with plenary power to define the scope of federal habeas for state prisoners, could not have spoken more clearly. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (opinion of Marshall, C.J.) ("the power to award the writ by any of the courts of the United States, must be given by written law"). Many times the Court has elected to devise its own bespoke "solution," eschewing the relevant statutory text. *See*, *e.g.*, *Wilson v. Sellers*, 138 S. Ct. 1188, 1197 (2018) (Gorsuch, J., dissenting) ("To see the problem with petitioner's presumption, start with the statute."); *McQuiggin v. Perkins*, 569 U.S. 383, 402 (2013) (Scalia, J., dissenting) ("The Constitution vests legislative power only in Congress, which never enacted the exception the Court creates today. That inconvenient truth resolves this case."); *Gonzalez v. Thaler*, 565 U.S. 134, 155 (2012) (Scalia, J., dissenting) ("Today's opinion transforms [§ 2253] into a provision that allows appeal so long as a district or circuit judge, for whatever reason or for no reason at all, approves it. This makes a hash of the statute."); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 646 (1998) (Scalia, J., dissenting) ("The Court today flouts the unmistakable language of the statute to avoid what it calls a 'perverse' result.").

The question presented in this case—whether the Court's recent decision in *Ramos v. Louisiana*, 140 S.

Ct. 1390 (2020), applies retroactively to reopen already-final convictions—invites the Court to, at best, render an advisory opinion and, at worst, make yet another atextual turn. Congress has already dictated, loudly and clearly, that Edwards cannot receive relief, whatever the Court thinks about the retroactivity of *Ramos*. His Sixth Amendment claim was already "adjudicated on the merits" in state court, and AEDPA's relitigation bar applies. 28 U.S.C. § 2254(d). Because that adjudication occurred when *Apodaca v. Oregon*, 406 U.S. 404 (1972), was on the books, whether the adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law" is measured against *Apodaca*, not *Ramos*. *Id.*, § 2254(d)(1). There are no "*Teague* exceptions" to § 2254(d)(1) that would permit a federal court to apply new rules announced by this Court after that state-court adjudication. *See Teague v. Lane*, 489 U.S. 288, 311–13 (1989) (plurality op.). That means no reasonable jurist could believe *Ramos* makes Edwards eligible for the writ, and the Fifth Circuit correctly denied a certificate of appealability. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The Court should dismiss the writ of certiorari as improvidently granted since the unambiguous text of § 2254(d) obviates any need to consider the question presented.[2]

Instead of presenting subsidiary and convoluted questions of retroactivity, this case requires just basic

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[2] *Amici* take no position on whether the unanimity requirement rediscovered in *Ramos* is a "watershed rule of criminal procedure" for purposes of *Teague*, except to observe that there are few circumstances in which answering that question would be necessary. *See infra*, p. 12, n.6. And that this is not one of them.

reading comprehension. Section 2254(d) on its face leaves no room for the *Teague* exceptions, of which Congress was plainly aware when it enacted AEDPA. *See*, *e.g.*, 28 U.S.C. §§ 2244(b)(2)(A), (d)(1)(C), 2254(e)(2)(A)(i). Nor can the Constitution be read to require federal courts to impose those exceptions over the will of the people, acting through the legislature. This Court should not (yet again) engage in "result-driven antitextualism," *Bond v. United States*, 572 U.S. 844, 868 (2014) (Scalia, J., concurring in the judgment), and import exceptions into § 2254(d) because of an illusory constitutional question.

And yet someone, somewhere, is sure to gravely intone that reading § 2254(d) for what it says implicates the Suspension Clause—as if this case involves a terrorist or traitor detained by the Executive without trial. In a discussion about habeas corpus, nothing is more disqualifying than the belief that the Suspension Clause has anything to do with prisoners who have already been convicted by a court of competent jurisdiction. *See Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1983, 1985 n.2 (2020) (Thomas, J., concurring); *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1094–95 (11th Cir. 2017) (*en banc*) (William Pryor, J.). The notion that a state prisoner is constitutionally entitled to federal review of his sentence would surely come as a surprise to the framers. State convictions were largely unreviewable by the federal courts for nearly the first 100 years of the Nation's history. And just because the phrase "habeas corpus" is used to describe today's federal review of state convictions, that no more

implicates the Suspension Clause than would a statute regarding the humane treatment of bats limit how a baseball player may hit a baseball.

The Court has humored the idea that the Suspension Clause might have something to do with state prisoners convicted by a court of competent jurisdiction for far too long. *See*, *e.g.*, *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996); *I.N.S. v. St. Cyr*, 533 U.S. 289, 300–01 (2001); *Boumediene v. Bush*, 553 U.S. 723, 746 (2008); *see also Thuraissigiam*, 140 S. Ct. at 1969, n.12. In any event, the availability of the so-called "original" writ ends the discussion here. *See Felker*, 518 U.S. at 663–65; 28 U.S.C. § 2241. Someday soon this shibboleth—that is, the notion that the Suspension Clause *requires* federal-court review of state prisoners' convictions—should be dispatched. But that is a question for another day. The Court need only confirm here that the Suspension Clause cannot plausibly mandate that new rules be applied to old convictions.

Adding to the confusion, some might also be under the misimpression after *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), that some new rules are a freestanding basis of relief if they fall within *Teague*'s exceptions. They are not. *Teague* in its original form was about the scope of the federal habeas writ, nothing more. *See Teague*, 489 U.S. at 308–09 (plurality op.); *Danforth v. Minnesota*, 552 U.S. 264, 278–79 (2008) ("Since *Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts."). Departing from these origins, *Montgomery* purported to constitutionalize one of the

Teague exceptions so that it would apply in Montgomery's *state court proceeding*—by itself an unexpected and erroneous result. *Montgomery* proves nothing about the scope of the congressionally limited federal writ where, as here, the petitioner's claim has already been decided by a state court. Indeed *Montgomery*, while still on the books, only underscores the absence of the *Teague* exceptions from § 2254(d). Reading the *Teague* exceptions into § 2254(d) would be mere surplusage because *Montgomery* has already voluntold the states into hearing certain *Teague*-excepted claims on the merits.

Whatever *Montgomery* requires of state postconviction courts, it has no application here. Congress could simply eliminate federal habeas for state prisoners entirely, returning us either to the pre-1867 status quo or the era thereafter when federal courts examined only whether the court of conviction was one of competent jurisdiction. *See Brown v. Allen*, 344 U.S. 443, 532–33 (1953) (Jackson, J., concurring in the judgment). Since Congress can do that, then Congress can also revise § 2254(d) to exclude new rules as a basis for invalidating old convictions. The Constitution does not require *Teague*'s exceptions to be grafted onto a statutory provision that plainly excludes them.

So why address the quasi-constitutional retroactivity question when the text of § 2254(d) compels this Court to deny relief? After AEDPA, *Teague* serves no significant or useful purpose when a state prisoner's claim has already been adjudicated on the merits in state court. That state-court adjudication may consider rules new and old if the state wishes. *See*

Danforth, 552 U.S. at 280–81 ("finality of state convictions is a *state* interest"). After that, the federal court's *only* role as prescribed by § 2254(d) is to assess that adjudication based on the law existing at the time of the adjudication. *See Greene v. Fisher*, 565 U.S. 34, 39–40 (2011); *Shoop v. Hill*, 139 S. Ct. 504, 507, 509 (2019) (per curiam); *see also Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011) ("backward-looking language requires an examination of the state-court decision at the time it was made").[3]

If, on the other hand, the claim has not been adjudicated on the merits in state court, then perhaps *Teague* and its exceptions may yet play their role in ensuring finality. *Cf. Horn*, 536 U.S. at 272. In those cases, § 2254(d) will not apply and a prisoner might satisfy AEDPA's other requirements. In such cases, federal habeas relief "*may*" be granted, not "shall" be granted. *See Withrow v. Williams*, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part). Whether the writ should issue remains within the court's "equitable discretion." *Id.* For example, a petitioner with an unadjudicated claim based on a new rule will generally not be entitled to relief unless the new rule falls within *Teague*'s exceptions. Those prisoners will almost certainly be procedurally defaulted (and, no, the "novelty" of the claim should not save

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[3] *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam), is not to the contrary. In *Horn*, this Court reversed a decision granting federal habeas relief that did not consider whether *Teague*'s retroactivity bar precluded relief. *See id.* at 272. *Horn* did not consider the *Teague* exceptions, and it confirmed that satisfying § 2254(d) "is of course a necessary prerequisite" to relief. *Id.*

them from their default).[4] But this too is a question for another day. The claim in this case was already adjudicated on the merits, *Ramos* did not retroactively invalidate that adjudication, and the Fifth Circuit wisely denied the certificate of appealability.

ARGUMENT

The Court should dismiss the writ of certiorari as improvidently granted. *Ramos* has no bearing on this case. In his state-postconviction proceeding pre-dating *Ramos*, Edwards claimed he was unconstitutionally convicted by a non-unanimous jury. The state court rejected that claim, consistent with this Court's then-undisturbed judgment in *Apodaca*. Because a state court already adjudicated his claim on the merits, the only question here is whether that adjudication "resulted in a decision that *was* contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (emphasis added). That standard does not contain an unspoken exception for new "watershed rules of criminal procedure." Congress made clear with AEDPA that a federal court is to judge the state court based on existing law, not new Supreme Court decisions post-dating the adjudication. The Constitution requires no more. Because any opinion on *Ramos*'s retroactivity would be purely advisory, the writ should be dismissed.

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[4] At some point the Court should overrule *Reed v. Ross*, 486 U.S. 1 (1984), a pre-AEDPA and pre-*Teague* precedent that if taken too seriously means defaulting petitioners are in a better spot than diligent ones subject to § 2254(d).

I. Section 2254(d) Has No *Teague* Exceptions

New rules ordinarily do not upset old convictions. AEDPA's revisions confirm that even a new watershed rule of criminal procedure cannot alone undo a federal habeas petitioner's state conviction. Those revisions were meant to effect a sea change in federal habeas practice, and "[i]t cannot be disputed that Congress viewed § 2254(d)(1)"—setting forth the deferential standard governing this case and many others—"as an important means by which its goals for habeas reform would be achieved." *Williams v. Taylor*, 529 U.S. 362, 404 (2000); *see also Martinez-Villareal*, 523 U.S. at 646 (Scalia, J., dissenting) ("There is nothing 'perverse' about the result that the statute commands, except that it contradicts pre-existing judge-made law, which it was precisely the purpose of the statute to change.").

Where, as here, a state court has already adjudicated a petitioner's claim on the merits, the claim must surpass AEDPA's so-called "relitigation bar":

> **(d)** An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > **(1)** resulted in a decision that *was* contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States….

28 U.S.C. § 2254(d)(1) (past tense emphasized). To overwrite a state-court decision, that decision must be "so lacking in justification that there was an error well

understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Unmistakably absent from that standard is *Teague*'s exception for watershed rules of criminal procedure announced after the state court's decision. Instead, § 2254(d)(1) judges the state's adjudication of a habeas petitioner's claim only against the law existing at the time of that adjudication.[5] *See Greene*, 565 U.S. at 39–40; *Shoop*, 139 S. Ct. at 507, 509.

A. The Case Should Be Dismissed Because Deciding Whether *Ramos* Is Retroactive Would Be Purely Advisory

In this federal habeas case it makes no difference whether this Court deems the newly announced rule in *Ramos* a "watershed rule of criminal procedure" because *Ramos* came *after* the state-court adjudication. Section 2254(d)(1)'s focus is whether "the State faithfully applied the Constitution as we understood it *at*

[5] If the claim is first adjudicated on the merits in state collateral review proceedings, ordinarily only the "old rules" existing at the time the prisoner's conviction became final would apply. *Cf. Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987). But, discussed further below, *Montgomery* now requires state postconviction courts to also consider new "substantive" rules, so long as the claim is "properly presented." 136 S. Ct. at 732. If, pursuant to *Montgomery*, a state court adjudicates a claim by applying the new "substantive" rule, then perhaps § 2254(d)(1)'s "clearly established Federal law" in a later federal habeas proceeding would include the new rule. *But see Horn*, 536 U.S. at 272 (reversing decision applying new procedural rule even though state court also applied the new rule). The Court need not resolve that question here, where the state court had no occasion to consider a new procedural rule announced *after* its decision.

the time," *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (emphasis added), not whether the "adjudication 'resulted in a decision that *became* contrary to, or an unreasonable application of, clearly established Federal law," *Greene*, 565 U.S. at 39; *see also Shoop*, 139 S. Ct. at 509. Applied here, the Louisiana court did exactly that. It obeyed *Apodaca* and rejected Edwards's claim. No reasonable jurist could believe that its decision was contrary to or an unreasonable application of Supreme Court precedent at the time. That alone resolves this case.

With AEDPA, Congress confirmed that state courts need not be fortune tellers for convictions to remain in place. Ordinarily, the state court need only apply the rules existing at the time of its adjudication or at the time the prisoner's conviction became final, whichever comes first. *See Greene*, 565 U.S. at 39–40; *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) ("clearly established Federal law" refers to "the governing legal principle or principles set forth by the Supreme Court *at the time* the state court renders its decision" (emphasis added)); *but see Montgomery*, 136 S. Ct. at 732 (requiring state postconviction courts to apply new "substantive" rules). Discussed further below, AEDPA provides no basis to vacate that state-court decision for failure to predict the future.

Whatever this Court says about the retroactivity of *Ramos*, it will not do anything to undercut the Fifth Circuit's denial of a certificate of appealability. A Louisiana court adjudicated Edwards's claim on the merits based on the then-prevailing precedent of this Court. That is all § 2254(d) requires. The Court should

defer the *Ramos* question for another day and dismiss the writ as improvidently granted.[6]

B. If the Court Does Not Dismiss the Case, Then It Should Finally Resolve Whether § 2254(d) Precludes Relief Even When New Rules Would Be Retroactive Under *Teague*

For two decades, the Court has avoided the particular question of whether *Teague*'s exceptions survived AEDPA's relitigation bar. But here, prudence dictates that the Court answer that statutory question before jumping ahead to the question presented.

First in *Horn v. Banks*, the Court stated "the AEDPA and *Teague* inquiries are distinct," 536 U.S. at 272, but the Court did not consider the particular question of whether § 2254(d)(1)'s standard of review leaves any room for claims based on an *exception* to

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[6] *Amici* take no position on whether the requirement of criminal jury unanimity rediscovered in *Ramos* is a watershed rule of criminal procedure for *Teague* purposes. Answering that question would be necessary in only three postures—(1) from a state habeas proceeding adjudicating the Sixth Amendment claim on the merits while purporting to apply *Teague*; (2) in a federal habeas proceeding involving an assuredly non-existent federal prisoner with a *Ramos* claim; or (3) in any other federal habeas proceeding involving a state prisoner whose claim was not adjudicated on the merits, most often because he procedurally defaulted the claim. In the last of these postures, the Court would have the opportunity to revisit whether the novelty of a claim is "cause" to avoid procedural default. *See infra* p. 17, n.10. (It surely should not be, because judge-made procedural default doctrine should not put defaulting petitioners in a better position than diligent ones subject to § 2254(d)'s bar.)

Teague (it does not). *Horn* involved *Teague*'s more common application—a court applied a new procedural rule retroactively without first considering whether *Teague* precluded it. *Horn* was not about *Teague*'s narrow exceptions. The Court therefore had no occasion to consider whether AEDPA permitted relief for a claim predicated on a watershed procedural rule that would be retroactive under *Teague* but that § 2254(d) would block. If anything, *Horn* strongly suggests that § 2254(d) would independently bar relief in such a case. As *Horn* explains, "a necessary prerequisite to federal habeas relief [is] that a prisoner satisfy the AEDPA standard of review set forth in 28 U.S.C. § 2254(d)," separate from *Teague*. *Id*.[7] A prisoner cannot satisfy that "necessary prerequisite" by relying on

[7] One way to make sense of *Horn*'s statement that "the AEDPA and *Teague* inquiries are distinct" is to consider a hypothetical case in which the petitioner's claim was not adjudicated on the merits. That petitioner, unburdened by § 2254(d), satisfies AEDPA's other requirements. Even so, *Teague* might independently bar relief. In *Horn*'s words, "none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard…." 536 U.S. at 272. That is because AEDPA erects *necessary* but not *sufficient* conditions for issuing the writ. When those conditions are met, the writ "may"—not "shall"—"be granted." 28 U.S.C. § 2241(a); *see also id.*, § 2254(d) ("shall *not* be granted" (emphasis added)); *Withrow*, 507 U.S. at 716 (Scalia, J., concurring in part and dissenting in part); *In re Lincoln*, 202 U.S. 178, 180 (1906) ("there is in every case a question whether the exercise of [habeas] jurisdiction is appropriate"). For example, a Fourth Amendment claim might clear all of AEDPA's hurdles, but that constitutional infirmity is not grounds for federal habeas relief. *See Stone v. Powell*, 428 U.S. 465, 493–94 (1976). So too with most new rules announced after the petitioner's conviction became final.

a new rule that a state court never had the opportunity to consider.

Decisions following *Horn* also left unresolved the statutory question implicated here. In *Whorton v. Bockting*, 549 U.S. 406 (2007), the parties briefed whether § 2254(d)(1) supplanted *Teague*. But the Court ultimately decided that *Crawford v. Washington*, 541 U.S. 36 (2004), was not a watershed procedural rule. *Crawford* thus would not justify relief even if § 2254(d)(1) silently incorporated *Teague*'s exceptions. *See Whorton*, 549 U.S. at 421. Similarly in *Greene v. Fisher*, the Court acknowledged the question "[w]hether § 2254(d)(1) would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague*," but *Greene* did not require the Court to resolve it. 565 U.S. at 39, n*.

Now is as good a time as any for the Court to confirm that the statutory language controls, thereby freeing federal courts from the *Teague* exceptions rigmarole in the mine-run of cases where it simply does not matter. This case is a vehicle for resolving that question, not the one the Court granted.

C. Section 2254(d) Cannot Possibly Be Read to Incorporate the *Teague* Exceptions As Grounds for Overriding State-Court Adjudications

Section 2254(d)'s backward-looking text leaves no room for doubt that a new Supreme Court precedent (like *Ramos*) post-dating the state's adjudication on the merits is insufficient to unwind that state-court adjudication. If it were, § 2254(d)(1) would read quite

differently—permitting habeas relief when a state-court adjudication *becomes* contrary to *newly* established federal law. *See Greene*, 565 U.S. at 39; *Shoop*, 139 S. Ct. at 509.

Section 2254(d) requires the federal habeas court to review a state-court adjudication through the lens of the law that the state court was required to apply. Here, that "clearly established Federal law as determined by the Supreme Court of the United States" included *Apodaca*'s then-undisturbed judgment that a non-unanimous state-court criminal jury verdict could stand. *See Apodaca*, 406 U.S. at 414; *see also Timbs v. Indiana*, 139 S. Ct. 682, 687 n.1 (2019) (citing *Apodaca*'s "holding" that the Sixth Amendment does not require unanimity in state criminal proceedings); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 766 n.14 (2010) (similar).[8] There can be no argument that the Louisiana court was permitted, let alone *compelled*, to flout the then-undisturbed judgment in

[8] One could also argue that prior to *Ramos* there was no "clearly established Federal law" on Edwards's Sixth Amendment claim, in which case the state-court adjudication likewise stands. *See Ramos*, 140 S. Ct. at 1399 (opinion of Gorsuch, J.) ("We've been studiously ambiguous, even inconsistent, about what *Apodaca* might mean."). Louisiana's adjudication cannot be "contrary to" or "an unreasonable application of" that which does not exist. Surely the mere existence of *Apodaca* injects "the possibility for fairminded disagreement" about Edwards's claim. *Harrington*, 562 U.S. at 103; *Williams*, 529 U.S. at 412 ("an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law"); *see also Ramos*, 140 S. Ct. at 1428 (Alito, J., dissenting) ("Consider what it would mean if *Apodaca* was never a precedent. It would mean the entire legal profession was fooled for the past 48 years.").

Apodaca. Only this Court can abrogate or overrule its precedents, however wrong.

And while one could overthink one's way into believing that *Ramos* just applies an "old rule,"[9] that is not a question that affects this Court's analysis here. "New" and "old" are not terms used in § 2254(d)(1). Its reference points are the precedents of this Court, not an alternative universe where a Louisiana court is supposed to insolently call time on *Apodaca*. (Similarly, even *Teague* defines old rules as those "'dictated' by prior precedent[s]" of this Court, not those dictated by the Constitution itself. *Whorton*, 549 U.S. at 416.) Wrong decisions like *Apodaca* are no less "clearly established Federal law" for § 2254(d)'s purposes.

Context confirms § 2254(d) supplants the *Teague* exceptions. Had Congress intended to codify them, it knew how to do so. AEDPA's general bar for second-or-successive petitions and evidentiary hearings, as well as its statute of limitations, all have exceptions that echo *Teague*. Each opens doors when a petitioner relies "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A); *see also id.*, §§ 2244(d)(1)(C), 2254(e)(2)(A)(i). No such language appears in § 2254(d)(1). That was intentional. *See Russello v.*

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[9] *See* Petitioner's Br. at 12–22. In any event, the view that *Apodaca* was not controlling precedent did not command a majority in *Ramos*. *See* 140 S. Ct. at 1402–04 (opinion of Gorsuch, J.); *see also id.* at 1408 (Sotomayor, J., concurring in part) (describing *Ramos* as "overruling precedent"); *id.* at 1419 (Kavanaugh, J., concurring in part) (describing *Ramos* as a "new rule"); *id.* at 1428 (Alito, J., dissenting).

United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation marks omitted)). Congress not only knew how but did create exceptions to AEDPA's other provisions. It did not do so for § 2254(d). And the Court should not do so now (or ever). *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("The short answer is that the Act contains no 'wholly groundless' exception, and we may not engraft our own exceptions onto the statutory text."); *see also Milner v. Dep't of the Navy*, 562 U.S. 562, 576 (2011) ("we have no warrant to ignore clear statutory language on the ground that other courts have done so").

A beginning student of habeas might reasonably ask exactly how the Court could declare a new rule retroactive for purposes of §§ 2244 or 2254(e) if § 2254(d) contains no exceptions. They will have forgotten that not all claims are adjudicated on the merits by a state court and thus are not subject to § 2254(d)'s relitigation bar. Procedurally defaulted claims are not—and if a petitioner could show cause and prejudice or is innocent and qualifies for the miscarriage-of-justice exception, such a case could provide a vehicle for declaring *Teague* exceptionality.[10] Still

[10] To be clear, in such cases, the "novelty" of a claim should not supply "cause" to avoid a procedural default. *See* Brief for Jonathan F. Mitchell and Adam K. Mortara in Support of Petitioner at 18–19, *Mathena v. Malvo*, No. 18-217. After *Teague* and then AEDPA, the novelty of a claim at most justifies a federal court's decision to stay a federal habeas proceeding while the petitioner

other cases involving similarly defaulted petitioners might require applying the *Teague*-like exceptions for second-or-successive petitions, untimely petitions, or requests for evidentiary hearings. The relative rarity of such opportunities is a feature not a bug of AEDPA, effected by Congress's substantial revision of § 2254(d). Where a state court has already taken the time to review a federal habeas petitioner's claim, AEDPA's relitigation bar pays special deference to that earlier state-court proceeding. *See Harrington*, 562 U.S. at 103 (state proceedings are "central," "not just a preliminary step," for federal habeas).

Nor does § 2254(d) foreclose all claims based on new developments in the law that might benefit state prisoners. If a habeas petitioner presents such a claim to a state court and the court adjudicates the claim by applying a new rule, the petitioner could later argue to a federal habeas court that the state adjudication was "contrary to" or "an unreasonable application of" the new rule voluntarily applied by the state court. 28 U.S.C. § 2254(d)(1); *see Danforth*, 552 U.S. at 282 (state courts permitted to apply new rules retroactively, even where *Teague* would not allow it in federal court); *but see Horn*, 536 U.S. at 272 (faulting federal court, before *Danforth*, for doing just that). Indeed, this is what *Montgomery* envisions. At least for "substantive" new rules, a state court will apply them and a federal court may later review its application so long

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attempts to exhaust that new claim in state court. *See Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). But the novelty of a claim ought not be cause for avoiding state court altogether. To the extent contrary, *Reed v. Ross*, 486 U.S. 1 (1984)—a pre-*Teague* and pre-AEDPA decision—should be overruled.

as the claim predicated on the new rule is not procedurally defaulted.[11] *See Montgomery*, 136 S. Ct. at 731–32. *Montgomery* is more confirmation that § 2254(d)(1) means what it says and no more.

Section 2254(d)(1) forecloses relief in this case. The Louisiana court rejected petitioner's Sixth Amendment claim on the merits when *Apodaca* bound that court. Section 2254(d)(1) does not now permit a federal court to take account of a new rule announced after that adjudication. If the Court does not dismiss the writ as improvidently granted, it should resolve this case by holding that *Ramos*, even if retroactive, has no impact whatsoever on petitioner's entitlement to federal habeas relief.

II. The Constitution Does Not Require *Teague* Exceptions in Post-Conviction Habeas Proceedings

In its original form, *Teague* had no constitutional dimension. *Teague* was instead a case about the scope of the federal habeas writ under the pre-AEDPA federal habeas regime. As *Teague* acknowledged, "[I]t has long been established that a final civil judgment entered under a given rule of law may withstand

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[11] *Montgomery* was expressly limited to *Teague*'s exception for "substantive" new rules, 132 S. Ct. at 729, and it is not clear its reasoning extends to "watershed rules of criminal procedure." The Court drew a sharp distinction between the two—substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose," while procedural errors "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise" but "the resulting conviction or sentence may still be accurate." *Id.* at 729–30 (quotation marks omitted).

subsequent judicial change in that rule." 489 U.S. at 308 (plurality op.). Until *Montgomery*, there could be no argument that *Teague*'s exceptions for substantive rules or watershed rules of criminal procedure were constitutionally compelled.

But *Montgomery* throws that into doubt. *Montgomery* described *Teague*'s exception for substantive new rules as "best understood as resting upon constitutional premises" and said state courts have "no authority to leave in place a conviction or sentence that violates a substantive rule. . . ." 136 S. Ct. at 729, 731. The notion that the Constitution requires a court to vacate a state prisoner's then-lawful conviction contradicts longstanding conceptions of the scope of the habeas writ. For most of this country's history, federal habeas relief for state prisoners was substantially limited, if not altogether foreclosed. *See Felker*, 518 U.S. at 663–64; *see*, *e.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202–03 (1830) (Marshall, C.J.). As Justice Scalia put it, "Any relief a prisoner might receive in a state court after finality is a matter of grace, not constitutional prescription." *Montgomery*, 136 S. Ct. at 739–41 (Scalia, J., dissenting). Even the Court in *Montgomery* appeared to agree that the Suspension Clause does not compel a state court to consider any and all claims based on substantive new rules—*Montgomery* requires consideration of such claims only if the "state collateral review procedures are open" to them and only if the claims are "properly presented." *Id.* at 731–32.

Montgomery, moreover, says nothing of federal habeas proceedings, and there is no provision of the Constitution that would require the Court to overlay

AEDPA with *Montgomery*. Extending *Montgomery* would cast doubt on § 2254(d)(1)'s constitutionality, which can only be read to exclude new rules announced after the state court's adjudication. *See supra* pp. 14–19. Indeed, extending *Montgomery* to federal habeas proceedings would—for the first time—imply that federal habeas review of state convictions is constitutionally required. By what? The Suspension Clause? Certainly not. *See McCarthan*, 851 F.3d at 1094 (William Pryor, J.). For many decades after the ratification of the Suspension Clause, there was no "habeas" mechanism for a federal court to review a state prisoner's conviction. Then in 1867, Congress created that mechanism, permitting the federal courts to issue writs of habeas corpus to state prisoners in limited circumstances. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 465–66, 474–75 (1963). It would then take many more decades for federal habeas as we know it today—nitpicking every aspect of the state proceedings—to come into being. *See Brown*, 344 U.S. at 532–34 (Jackson, J., concurring in the judgment); Bator, *Finality in Criminal Law*, 76 HARV. L. REV. at 499–507. Today's conceptions of federal habeas are court-created, not required by the Suspension Clause.

It follows that if federal habeas review of a state prisoner's conviction is not constitutionally required, then federal habeas relief depending on a new rule of criminal procedure—not in existence at the time a prisoner was tried and convicted in a court of competent jurisdiction—cannot possibly be constitutionally required. There is thus no problem with reading § 2254(d)(1) for what it says and no more. Congress

could do away with § 2254 petitions altogether, and there still would be no constitutional infirmity. Crisis averted.

And if this greater-includes-the-lesser argument has not yet persuaded, then the availability of original writs from this Court should. *See Felker*, 518 U.S. at 663. Third-degree abuse of a statute—*i.e.*, reading § 2254(d) not to apply to original writs in this Court—would be far preferable to the capital crime of defacing § 2254(d) with the *Teague* exceptions.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

ADAM K. MORTARA
Counsel of Record
TAYLOR A.R. MEEHAN
BARTLIT BECK LLP
54 W. Hubbard Street
Suite 300
Chicago, IL 60654
(312) 494-4400
adam.mortara@bartlitbeck.com

Counsel for Amici Curiae

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